1. The memorandum in opposition (pp. 1-2) argues that, although the Court of Appeals found federal jurisdiction based on 28 U. S. C. § 1331 (App. to Pet., p. A3, n. 5a), neither that section nor 28 U. S. C. § 1337 confer jurisdiction in the instant case. This argument is specious. Jurisdiction under either Section 1331[2] or 1337[3] has repeatedly been found in situations such as that *sub judice*. *Russo* v. *Kirby*, 453 F. 2d 540 (2nd Cir., 1971), the sole authority relied on by the Teamsters, is inapposite. The plaintiffs in *Russo* were striking employees seeking the payment of the state welfare payments notwithstanding that no federal law "create[d] a cause of action" for such benefits (453 F. 2d at 551) and, in addition, that their individual claims of less than $10,000 could not be aggregated. Here, conversely, the plaintiff is a single employer, with an individual claim exceeding $10,000, whose complaint is grounded on the federally-conferred right to participate in collective bargaining free from state interference. Such a claim is "a substantial one" whose correctness, as this Court has recognized in a similar situation, "is a question which goes to the merits . . ." *American Federation of Labor* v. *Watson*, 327 U. S. 582, 591 (1946).

2. The memorandum in opposition (pp. 2-4) also argues that the appropriate test for determining mootness is not, as the petition (p. 6) argues, "whether the question presented is an important one which, unless resolved, is likely to recur", but,

2. See, e.g., *Almacs, Inc.* v. *Hackett*, 312 F. Supp. 964 (D. R. I, 1970); *General Electric Company* v. *Callahan*, 294 F. 2d 60, 63 (1st Cir., 1961); *Oil, Chemical and Atomic Workers International Union Local 5-283* v. *Arkansas Louisiana Gas Company*, 332 F. 2d 64, 65 (10th Cir., 1964); *Cab Operating Corp.* v. *City of New York*, 243 F. Supp. 550, 552 (S. D. N. Y., 1965); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667, 671 (W. D. Mich., 1955); *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 654 (D. Del., 1967).

3. See, e.g., *Almacs, Inc.* v. *Hackett*, 312 F. Supp. at 967; *General Electric Company* v. *Callahan*, 294 F. 2d at 63, n. 3; *I. T. T.* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970), *cert. den.*, 402 U. S. 933 (1971).

rather, "whether, in fact, there are parties who actually have between them a real dispute existent at the time the case is being decided by a court." This contention presumes that, by virtue of *Oil Workers Local 8-6* v. *Missouri*, 361 U. S. 363 (1960), and *Street Employees Division* v. *Missouri*, 374 U. S. 74 (1963), the "capable of repetition yet evading review" mootness rule of *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498 (1911), no longer retains vitality or, at least, vitality with respect to labor disputes. There are several fatal defects in this assertion.

First, as the numerous cases cited in the petition (p. 6, n. 3 and 4), and in particular *Roe* v. *Wade*, 93 S. Ct. 705 (1973), demonstrate, the *Southern Pacific* principle is a firmly imbedded doctrine as applicable today as when formulated. *Oil Workers* and *Street Employees*, for the reasons set forth in the petition (pp. 6-8 and n. 5), do not carve out an exception to this doctrine for cases arising in a labor context.

Second, there are numerous parties in this proceeding, i.e., the State of New Jersey, the Chamber of Commerce of the United States as well as the petitioner and Teamsters Local 676, who continue to dispute the constitutionality of granting state welfare assistance to strikers. It is that question, not the underlying labor controversy, which constitutes the "real dispute" in this case. There is, in short, as the Court of Appeals acknowledged (App. to Pet., p. A14), "an on-going interest in the issue raised in this litigation." Even under the test proposed by the Teamsters, therefore, the instant case should not have been deemed moot.

Finally, in this case, in contrast to the quoted language (memorandum, pp. 3-4) of *Oil Workers* (361 U. S. at 371), "there is here a subject matter"—the state payment of welfare benefits to strikers—on which a judgment could clearly operate —and "something to be done"—barring such payments in the future as violative of federal labor policy—which has not "already taken place." And surely, since New Jersey's grant of welfare assistance to strikers is virtually a continuing daily occurrence, if the Court of Appeals had reversed the District

Court's affirmance of that practice, it would not have merely "avoid[ed] an event which had already passed beyond recall."

3. The Teamsters' memorandum (pp. 4-7) also argues that, since the Department of Health, Education and Welfare has been considering a revision of § 233.100(a)(1) of its regulations governing the Aid to Families of Dependent Children (AFDC) program, grant of certiorari is inappropriate. This contention disregards the fact that the present action challenged not only the payment of AFDC benefits to strikers but also the grant of assistance to strikers under two entirely state-financed programs, Aid to Families of the Working Poor, N. J. S. A. 44:13-1, *et seq.*, and General Public Assistance, N. J. S. A. 44:8-107, *et seq.* See the decision below at App. to Pet., p. A2, n. 2. None of these programs would be affected in any way by HEW's proposed regulations. Cf. *Merriam* v. *Kunzig*, 476 F. 2d 1233, 1239 (3d Cir. 1973). Moreover, HEW has now made a determination, effective July 12, 1973, to adopt proposed Alternative A (see memorandum, pp. 5-6) which expressly abstains, according to Secretary Weinberger, from a "federal mandate either to include or exclude strikers . . ." and leaves this option to each individual state. White Collar Report, No. 851, p. A-11 (BNA; July 13, 1973). The underlying question in this case, accordingly, even with respect to the AFDC program, continues to remain undecided and to warrant, as described in the petition (pp. 10-13), review by this Court.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION, and A. ROBERT SCHAEVITZ,

Petitioners,

v.

LLOYD W. MCCORKLE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

STATEMENT OF ATTORNEY GENERAL OF NEW JERSEY ON BEHALF OF RESPONDENTS, LLOYD MC CORKLE, IRVING ENGELMAN AND FRED STRENG

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On June 15, 1973, subsequent to the filing of the petition for writ of certiorari, the Attorney General of New Jersey, on behalf of respondents Lloyd McCorkle, Irving Engelman and Fred Streng, notified the Court that the

State did not intend to file a brief in opposition to the petition. On July 8, 1973, a memorandum in lieu of brief in opposition to the petition was filed by respondent Teamsters Local Union No. 676. On July 16, 1973, the Attorney General of New Jersey was advised by the Clerk that the Court had directed a printed response to be filed.

This case arose out of a complaint filed in the United States District Court (D. N. J.) seeking declaratory and injunctive relief on federal constitutional and statutory grounds and on state statutory grounds against the operation of three New Jersey welfare programs which do not automatically exclude strikers from benefits thereunder. The Attorney General defended the action in the district court on its merits, urging that the challenged welfare programs are neither violative of the state nor federal constitutions or statutes and that the identical issue was previously determined in the State's favor in *ITT Lamp Division* v. *Minter,* 435 F. 2d 989 (1st Cir. 1970), *cert. denied,* 402 U. S. 933 (1971). Upon a denial of injunctive relief and a dismissal of the complaint, the plaintiffs appealed to the United States Court of Appeals for the Third Circuit and on appeal the Attorney General again defended on the aforestated bases.

On November 22, 1972, the Court of Appeals issued the decision which is the subject of the instant petition for writ of certiorari. This decision completely eschews the merits of the case to which all of the Attorney General's defenses had been directed and is premised solely on the proposition that the issue presented to the court was moot and that therefore dismissal was warranted.

Accordingly, the Attorney General of the State of New Jersey does not deem it appropriate to take a position with respect to the petition for writ of certiorari since at

no time during the course of the instant proceedings did the Attorney General urge the doctrine of mootness which is the basis of the lower court's decision. The Attorney General has concluded that there is no reason for the State to assume an adversary role with respect to this issue for the first time at this juncture. It should be noted, moreover, that it was the respondent Union which briefed and argued the mootness point in the courts below and it was upon its urging that the court accepted this view of the case. The respondent Union has also opposed the petition for certiorari and filed a memorandum covering the mootness issue. Accordingly, this is not a case such as *Boynton* v. *Virginia,* 364 U. S. 454 (1960) in which the court is faced with a unilateral submission on an issue of great importance. Therefore, there is no factor which would point in favor of the Attorney General taking a position on this question.

Respectfully submitted,

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